Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

Vol. 25 SEPTEMBER 4, 1991 No. 36

This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

The decisions, rulings, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Logistics Management, Printing and Distribution Branch, Washington, D.C. 20229, of any such errors in order that corrections may be made before the bound volumes are published.

U.S. Customs Service

Treasury Decision

(T.D. 91–72)

SYNOPSES OF DRAWBACK DECISIONS

The following are synopses of drawback authorizations issued January 29, 1991, to June 27, 1991, inclusive, pursuant to Subpart C, Part 191, Customs Regulations; land approvals under Treasury Decision 84–49.

In the synopses below are listed for each drawback rate approved under 19 U.S.C. 1313(b), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the factories where the work will be accomplished, the date the statement was signed, the basis for determining payment, the Regional Commissioner to whom the rate was forwarded or issued by, and the date on which it was issued.

Date: August 14, 1991.
File: DRA–1–09
223323

MARVIN M. AMERNICK,
(For John Durant, Director,
Commercial Rulings Division.)

(A) Company: Aectra Refining & Marketing, Inc.
Articles: Gasolines; refinery feedstocks; kerosene; jet fuels; residuals; petrochemical products
Merchandise: Various naphthas and raffinate
Factories: At its agents operating under T.D. 55027(2) and T.D. 55207(1)
Statement signed: May 28, 1991
Basis of claim: Appearing in
Rate forwarded to RC of Customs: Houston, June 24, 1991

(B) Company: Automatic Liquid Packaging, Inc.
Articles: Lomudal nebulizer ampoules
Merchandise: Sodium cromoglycate
Factory: Woodstock, IL
Statement signed: September 9, 1988
Basis of claim: Used in
Rate forwarded to RC of Customs: Chicago, May 16, 1991

(C) Company: Bradford Industries, Inc.
Articles: Polyurethane coated material
Merchandise: Skincoat and adhesive polyurethanes; coagulated fabric
Factory: Lowell, MA
Statement signed: June 20, 1990
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, May 31, 1991
Revokes: T.D. 83–257–A (Compo Industries, Inc.)

(D) Company: Cooper Power Systems, Inc., d/b/a McGraw-Edison Power Systems
Articles: High voltage power factor correction capacitors
Merchandise: Polypropylene film; aluminum foil
Factory: Greenwood, SC
Statement signed: November 6, 1990
Basis of claim: Used in
Rate forwarded to RC of Customs: Boston, April 26, 1991

(E) Company: Crompton & Knowles Corp.
Articles: Coal tar dyestuffs; pigments and intermediates; blends of dyestuffs; dyestuffs reduced in strength
Merchandise: Various chemicals
Factory: Nutley, NJ
Statement signed: December 7, 1990
Basis of claim: Used in
Rate issued by RC of Customs in accordance with § 191.25(b)(2): New York, January 29, 1991
Revokes: T.D. 86–70–B to cover a change in name from Atlantic Industries Inc.

(F) Company: The Dow Chemical Co.
Articles: Methyl chloride; methylene chloride; chloroform
Merchandise: Methanol
Factories: Midland, MI; Plaquemine, LA; Freeport, TX
Statement signed: April 9, 1991
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative values at the time of separation
Rate forwarded to RCs of Customs: Houston & Chicago, April 30, 1991

(G) Company: Eastman Kodak Co.
Articles: Resin coated paper cut to specific lengths
Merchandise: Photographic raw base paper
Factory: Rochester, NY; Windsor, CO
Statement signed: September 26, 1990
Basis of claim: Appearing in
Rate forwarded to RC of Customs: Boston, April 19, 1991

(H) Company: Edwards-Warren Tire Co., d/b/a America OTR
Articles: Off the highway tires
Merchandise: Steel cord; bead wire; nylon 6 fabric
Factory: Bloomington, IL
Statement signed: November 5, 1990
Basis of claim: Appearing in
Rate forwarded to RC of Customs: Chicago, May 14, 1991

(I) Company: Heterochemical Corp.
Articles: Menadione sodium bisulphite complex (MSBC) a/k/a Hetrogen K
Merchandise: Menadione sodium bisulfibe (MSB)
Factory: Valley Stream, NY
Statement signed: August 22, 1988
Basis of claim: Appearing in
Rate forwarded to RC of Customs: New York, May 29, 1991

(J) Company: Lawter International, Inc.
Articles: Inks; pigments
Merchandise: Ortho-para toluene sulphonamide; paraformaldehyde; fluorescent yellow FGPN; rhodamine 7G, F4G and F3B
Factory: Chicago, IL
Statement signed: September 25, 1990
Basis of claim: Appearing in
Rate forwarded to RC of Customs: Chicago, May 24, 1991

(K) Company: Lou Ana Foods, Inc.
Articles: Refined peanut oil
Merchandise: Crude peanut oil
Factory: Opelousas, LA
Statement signed: October 11, 1991
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative values at the time of separation
Rate forwarded to RC of Customs: New Orleans, April 25, 1991
Revokes: T.D. 85–1–S

(L) Company: MacAndrews & Forbes Group, Inc., d/b/a MacAndrews & Forbes Co.
Articles: Licorice paste; licorice spray dried; licorice semi-fluid (liquid)
Merchandise: Licorice extracts
Factory: Camden, NJ
Statement signed: July 25, 1989
Basis of claim: Appearing in
Rate forwarded to RC of Customs: Boston May 28, 1991
Revokes: T.D. 84–2–I (MacAndrews & Forbes Co.)

(M) Company: Magruder Color Co., Inc.
Articles: Color pigments, wet and dry
Merchandise: Dye intermediates
Factories: Carteret & Newark, NJ
Statement signed: April 23, 1991
Basis of claim: Used in
Rate issued by RC of Customs in accordance with § 191.25(b)(2): New York, May 21, 1991
Revokes: T.D. 86–126–I to cover a change in name from Indol Color Co., Inc.

(N) Company: MEMC Electronic Materials, Inc.
Articles: Silicon monocrystalline ingot and wafers
Merchandise: Polycrystalline elemental silicon; silicon monocrystalline ingot
Factories: Moore, SC; St. Peters, MO
Statement signed: October 16, 1990
Basis of claim: Used in, less valuable waste
Rate forwarded to RCs of Customs: Chicago & New York, June 11, 1991

(O) Company: Miles Inc.
Articles: Cipro tablets
Merchandise: Ciprofloxacin hydrochloride
Factory: West Haven, CT
Statement signed: December 5, 1990
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, June 18, 1991

(P) Company: Phibro Refining, Inc.
Articles: Marine fuel oils
Merchandise: Residual oil (No. 6 oil); distillate oils
Factories: Houston, TX; Harvey, LA (@its agents operating under T.D. 55027(2) and/or T.D. 55207(1))
Statement signed: December 10, 1990
Basis of claim: Used in
Rate forwarded to RC of Customs: Houston, June 27, 1991

(Q) Company: Pilot Industries of Texas, Inc.
Articles: Alkyl aromatic (PAL–2 or ECA 12504)
Merchandise: C24 oligomer (OLP or ECA 6492)
Factory: Houston, TX
Statement signed: December 20, 1990
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative values at the time of separation
Rate forwarded to RC of Customs: Houston, April 26, 1991

(R) Company: Quantum Chemical Corp.
Articles: Linear low density polyethylene; low density polyethylene; high density polyethylene
Merchandise: Ethylene
Factories: Houston, Port Arthur, & Alvin, TX; Morris & Tuscola, IL; Clinton, IA
Statement signed: February 4, 1991
Basis of claim: Used in
Rate forwarded to RC of Customs: Houston, May 24, 1991

(S) Company: Revlon, Inc., d/b/a MacAndrews & Forbes Co.
Articles: Licorice paste; licorice spray dried, licorice semi-fluid (liquid)
Merchandise: Licorice extracts
Factory: Camden, NJ
Statement signed: May 31, 1990
Basis of claim: Appearing in
Rate forwarded to RC of Customs: Boston, May 28, 1991

(T) Company: R. J. Reynolds Tobacco Co.
Articles: Cigarettes; cigarette tobacoo-blended, cased & cut; cigarette tobacco-blended & cased; cigarette tobacco-blended; expanded (puffed) tobacco; reconstituted leaf/homogenized leaf blended tobacco; denicotinized tobacco
Merchandise: Menthol; tobacco stems (flue-cured cut rolled stems)
Factories: Winston-Salem & Forsyth County, NC
Statement signed: January 31, 1990
Basis of claim: Used in
Rate forwarded to RC of Customs: Miami, May 9, 1991

(U) Company: Schering-Plough Products, Inc.
Articles: Pharmaceutical products
Merchandise: Theophylline anhydrous USP XXI powder
Factories: Miami, FL; Las Piedras, PR
Statement signed: January 28, 1991
Basis of claim: Used in
Rate issued by RC of Customs in accordance with § 191.25(b)(2): New York, April 30, 1991
Revokes: T.D. 89–29–Q to cover a change in name from Key Pharmaceuticals, Inc.

(V) Company: Soltex Polymer Corp.
Articles: High density polyethylene
Merchandise: Ethylene
Factory: Deer Park, TX
Statement signed: July 16, 1990
Basis of claim: Used in
Rate forwarded to RCs of Customs: New York & Houston, April 24, 1991

(W) Company: Texaco Chemical Co.
Articles: 1,3–butadiene
Merchandise: Crude butadiene
Factory: Port Neches, TX
Statement signed: August 27, 1990
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative values at the time of separation
Rate forwarded to RCs of Customs: New York & Houston, April 24, 1991

(X) Company: Ulano Corp.
Articles: Stencil remover liquid, concentrate & paste; indirect films; capillary direct films; masking films; knifecut films
Merchandise: Gelatins; Diazo-S; sodium metaperiodate; polyester films
Factories: Brooklyn, NY (3)
Statement signed: November 26, 1990
Basis of claim: Appearing in
Rate forwarded to RC of Customs: New York, June 24, 1991

(Y) Company: Union Carbide Chemicals and Plastics Co., Inc.
Articles: Ethyl alcohol, pure 190°; ethol alcohol, pure 200°; specially denatured alcohols; chemical derivatives of ethyl alcohol
Merchandise: Ethyl alcohol (hydrated); ethyl alchol (anhydrous)
Factories: Port Lavaca & Texas City, TX; Hahnville, LA; Charleston, South Charleston & Sistersville, WV; Bound Brook, NJ
Statement signed: March 1, 1991
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative values at the time of separation
Rate forwarded to RC of Customs: New York, May 9, 1991
Revokes: T.D. 85–41–X (Union Carbide Corp.)

(Z) Company: Wright Corp.
Articles: Hexamethylenetetramine
Merchandise: Methanol
Factory: Riegelwood, NC
Statement signed: November 5, 1990
Basis of claim: Used in
Rate forwarded to RC of Customs: Miami, April 24, 1991

APPROVALS UNDER T.D. 84–49

(1) Company: Coastal West Ventures, Inc.
Articles: Various petroleum products
Merchandise: Crude petroleum and petroleum derivatives
Factory: Hercules, CA
Statement signed: November 19, 1990
Basis of claim: As provided in T.D. 84–49
Rate forwarded to RC of Customs: Houston, May 15, 1991

(2) Company: Diamond Shamrock Refining and Marketing Co.
Articles: Various petroleum derivatives
Merchandise: Crude petroleum and petroleum derivatives
Factories: Moore County, near Dumas & Three Rivers, TX
Statement signed: December 31, 1990
Basis of claim: As provided in T.D. 84–49
Rate forwarded to RC of Customs: Houston, May 31, 1991
Revokes: Hq's unpublished authorization letter of April 5, 1991

(3) Company: Exxon Corp.
Articles: Various petroleum products
Merchandise: Crude petroleum and petroleum derivatives
Factories: Baytown (2) & Mont Belvieu, TX; Baton Rouge, LA (3); Linden & Bayonne, NJ; Benicia, CA; Billings, MT
Statement signed: March 22, 1990
Basis of claim: As provided in T.D. 84–49
Rate forwarded to RC of Customs: Houston, May 9, 1991

(4) Company: Lyondell Petrochemical Co.
Articles: Various petroleum products
Merchandise: Crude petroleum and petroleum derivatives
Factories: Houston & Channelview, TX
Statement signed: May 17, 1991
Basis of claim: As provided in T.D. 84–49
Rate forwarded to RC of Customs: Houston, June 18, 1991

(5) Company: Mobil Oil Corp.
Articles: Jet fuel; petroleum coke; propane propylene mix (liquified petroleum gas); sulphur
Merchandise: Crude petroleum and petroleum derivatives
Factories: Beaumont, TX; Chalmette, LA; Joliet, IL; Paulsboro, NJ; Torrance, CA
Statement signed: February 8, 1990
Basis of claim: As provided in T.D. 84–49
Rate forwarded to RC of Customs: Houston, April 24, 1991

(6) Company: Phillips 66 Co.
Articles: Neohexene; isobutylene; fuel gas
Merchandise: Diisobutylene; ethylene
Factories: Bartlesville, OK; Pasadena, TX
Statement signed: June 26, 1985
Basis of claim: As provided in T.D. 84–49
Rate issued by RC of Customs in accordance with § 191.25(b)(2): Chicago, July 11, 1991
Revokes: T.D. 85–165–2 and Regional Commissioner's unpublished authorization letter dated April 20, 1988

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 142

[RIN 1515–AB08]

LINE RELEASE

AGENCY: Customs Service, Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs Regulations by providing a new method of processing entries of merchandise entering the U.S. It is proposed that this new method, Line Release, which is designed to release and track repetitive shipments through bar code technology, may be used as a form of entry or immediate delivery at certain land border locations approved by Customs. Line Release processing will result in expedited release of repetitive shipments.

DATE: Comments must be received on or before October 28, 1991.

ADDRESS: Written comments (preferably in triplicate) may be addressed to and inspected at the Regulations and Disclosure Law Branch, Room 2119, U.S. Customs Service, 1301 Constitution Avenue, N.W., Washington, D.C. 20229. Comments relating to the information collection aspects of the proposal should be directed to U.S. Customs, 1301 Constitution Avenue, N.W., Paperwork Management Branch or the office of Management and Budget, Attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington D.C. 20503.

FOR FURTHER INFORMATION CONTACT: William Nolle, Office of Automated Commercial Systems (202) 566–7907.

SUPPLEMENTARY INFORMATION:

Background

When merchandise is imported into the U.S., it must be entered pursuant to 19 U.S.C. 1484. After arrival, merchandise is kept in Customs custody and may not be released until an entry has been filed with sufficient documentation to enable the appropriate Customs officer to determine whether it may be released. Entry means filing the documentation required by § 142.3, Customs Regulations (19 CFR 142.3). The documentation required includes Customs Form 3461, or CF 3461 Alt in

the case of merchandise imported from Canada or Mexico with a Inward Cargo Manifest, Customs Form 7533; evidence of the right to make entry; a commercial invoice, pro forma invoice, or other acceptable documentation; a packing list and other documents required for a particular shipment.

Generally, Customs will review the entry package to determine if all the necessary information is included and is accurate and will determine if an examination is required. After the documentation has been reviewed and/or the examination conducted, Customs will authorize the delivery of the merchandise, if appropriate.

Entry summary documentation (CF 7501) must be filed within 10 working days after the time of entry. Unless the filer uses the Automated Clearinghouse method of payment, payment must accompany the submission of the entry summary documentation. If an entry summary is filed at the time of entry, Customs Form 3461 or 7533 is not required Merchandise for which an entry summary serves as both an entry and an entry summary will not be released until a bond on Customs Form 301 containing the conditions set forth in 19 CFR 113.62 has been filed.

Because the entry process may take some time to complete and release could be delayed, 19 U.S.C. 1448(b) authorizes the Secretary of the Treasury to provide by regulation for the issuance of special permits for delivery of merchandise when immediate delivery is necessary. Customs Regulations regarding immediate delivery are set forth in § § 142.21 *et seq*. An appropriate bond is required for immediate delivery privileges. Merchandise for which a special permit is issued is considered in Customs custody until the filing of an entry summary for consumption with estimated duties. Documentation must be filed and estimated duties, if any, deposited within 10 working days after the merchandise or any part of it is authorized for release under a special permit for immediate delivery.

Line Release

Customs has now developed an automated method to expedite the release of certain shipments. The method is known as Line Release. Line Release is designed for the release and tracking of highly repetitive, high volume shipments through the use of personal computers and bar code technology. Line Release will be both faster and require less paperwork than other entry methods.

Use of Bar Code Technology:

Line Release allows Customs to identify high volume and repetitive shipments. Customs officers at the port of entry will identify these shipments by means of a bar code which appears on the invoice that is submitted. The bar code contains the elements necessary to uniquely identify a routine import transaction: a shipper/manufacturer code, an importer code, the national entry filer code and a product code. The bar

code is called the Common Commodity Classification Code or the C–4 Code.

An entry filer (a broker or importers filing its own entries) who believes that shipments imported into a particular land border port would qualify for Line Release because they are routine, repetitive, high-volume shipments with a history of invoice accuracy, may apply to participate in Line Release by providing Customs with certain information, including shipper or manufacturer name, address and manufacturer identification (MID), importer name, address and importer of record number, entry filer name, importer of record number, a product description, unit of measure, HTSUS subheading number or subheading number range and a representative sample of a commercial invoice for the shipments.

In order to parallel existing release systems (CF 3461 and CF 3461 ALT, Entry/Immediate Delivery Application), Line Release applicants must also indicate on the Line Release application if the release applied for is an entry or immediate delivery. Any application which fails to state whether the release is to be an entry or immediate delivery will be returned.

Upon receipt of a complete application, the District Director will determine if the combination of elements qualifies for Line Release. If the elements qualify, Customs Headquarters will assign a C–4 Code. The entry filer must then have the C–4 Code printed in bar code format.

The C–4 Code in bar code format and other required identifying data must be either printed on labels which are thereafter affixed to the invoices used for the described merchandise or preprinted directly on the invoices.

All releases which use the C–4 Code will be considered either an entry or an immediate delivery as elected by the Line Release applicant. Should the applicant wish to change the entry or immediate delivery indicator, a written request must be made to the district director where the C–4 Code is used. If a temporary change is desired, the request must state the date the C–4 Code is to be returned to the originally requested release type. For those applications that have already been approved and C–4 Codes issued, unless Customs is notified in writing to the contrary, the following will apply: all releases which use already issued C–4 Codes at the northern border will be considered immediate deliveries; all releases based on already issued C–4 Codes at other locations will be considered entries.

Procedure When Merchandise is Imported through Line Release:

When shipments which have qualified for Line Release are imported at a land border port, the carrier, importer or filer presents Customs with an invoice containing the bar code. In addition to the invoice with bar code, the carrier, importer or filer shall present the manifest documentation which reflects the location and the method of transportation, and any other documentation required. The Customs inspector will

scan the bar code using a computer and verify that the system data agrees with the information on the documentation.

The inspector will key in the quantity. An entry number will be assigned automatically to the transaction. For the purposes of Line Release, "entry number" when the release is an immediate delivery refers merely to the Line Release transaction number. This number does not become the actual entry number until an entry for the merchandise released under the immediate delivery procedure is filed. Release data will be printed on the back of the invoice and the manifest document. The invoice will be returned to the entry filer and the manifest document will be retained by Customs.

Examinations:

If there is no discrepancy in documentation and the inspector has determined that neither the conveyance nor the merchandise warrants additional examination, the merchandise generally will not be examined.

Random system-generated examinations, however, will occur. Also, if there is a discrepancy in documentation or the documentation does not appear to accurately reflect the merchandise being imported, the inspector may order an examination. Further, examinations may be ordered even if the Line Release data and/or documents are consistent, if the inspector determines that the driver, conveyance or merchandise warrants additional examination.

In certain instances when there is an examination, the shipment is removed from Line Release processing, does not receive an entry number, and the entry filer is required to file a CF 3461 or CF 3461 Alt. In other instances, the Line Release assigned entry number is retained pending the result of the examination.

Whenever there is an examination, the carrier may not proceed until Customs has completed the examination.

Notification of Release of Merchandise:

When the Customs officer at the Line Release site determines that a shipment is ready for release, release data, consisting of the entry number, the date and time of release, the inspector's badge number, the quantity and unit of measure, and the C–4 Code will be printed on the invoice and the manifest document. The invoice shall be returned to the entry filer and the manifest document shall be retained by Customs. The returned invoice with the printed release data shall be the release notification to non-ABI participants. If the Line Release entry filer is an operational ABI participant, the filer also shall receive an electronic notification of the release consisting of the importer of record number, district/port of entry, filer code, entry number, date and time of release, manufacturer code, quantity and unit of measure, release site, HTSUS subheading number(s), C–4 Code and country or countries of origin.

Entry filers have 10 working days from the date of release in which to file the entry summary, CF 7501, or file an entry if the merchandise was released pursuant to an immediate delivery.

Benefits of Line Release:

The use of Line Release requires less document preparation by the entry filer. Merchandise thus moves faster and there are significant savings in labor for Customs and the trade community. Further, when Line Release data is transmitted to the ACS computer, the Line Release transmission creates standard entry records and these records are written to the entry master file. The entry records assist the Line Release sites and entry control units in tracking Line Release transactions.

PROPOSAL

It is proposed to amend Part 142, Customs Regulations, to set forth the requirements for Line Release. A new subpart D would be added to Part 142 defining Line Release and explaining the procedures for participants.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments (preferably in triplicate) that are submitted timely to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.41 Treasury Department Regulations (31 CFR 1.4) and § 103.11(b), Customs Regulations (19 CFR 103.11(b), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations and Disclosure Law Branch, Room 2119, Customs Headquarters, 1301 Constitution Avenue, N.W., Washington, D.C.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that, if adopted, the proposed amendments will not have a significant economic impact on a substantial number of small entities, Accordingly, they are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

PAPERWORK REDUCTION ACT

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget (OMB) for review in accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3540(h)). Comments on the collection of information should be sent to the Office of Management and Budget, Attention:

Desk, Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, D.C. 20503, with copies to the U.S. Customs Service at the address previously, specified.

The collection of information in this regulation is in section 142.42. The information is necessary to determine eligibility to participate in the Line Release program. The likely respondents are business or other for-profit institutions.

Estimated total annual reporting and/or recordkeeping burden: 4200 hours.

Estimated average annual burden per respondent and/or recordkeeper: 25 hours.

Estimated number of respondents: 168.

Estimated annual frequency of responses: 100.

Part 178, Customs Regulations (19 CFR Part 178), which lists the information collections contained in the regulations and control numbers assigned by OMB, would be amended accordingly if this proposal is adopted.

DRAFTING INFORMATION

The principal author of this document was Harold M. Singer, Regulations and Disclosure Law Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 142

Customs duties and inspection, Imports.

PROPOSED AMENDMENTS

It is proposed to amend Part 142, Customs Regulations (19 CFR Part 142), as set forth below.

PART 142 – ENTRY PROCESS

1. The authority citation for Part 142 continues to read as follows:

Authority: 19 U.S.C. 66, 1448, 1484, 1624.

2. Part 142 is amended by adding a new Subpart D to read as follows:

SUBPART D – LINE RELEASE

Sec.

§ 142.41 Line Release.

Line Release is an automated system designed to release and track repetitive shipments. It is a method of entry or immediate delivery

extended to importers of merchandise which Customs deems to be repetitive and high volume. Line Release may be used only at those land border locations approved by Customs for handling Line Release.

§ 142.42 Application for Line Release processing.

In order to obtain approval for processing import transactions through Line Release, a broker or importer filing its own entries (entry filer) must submit an application to the District Director, signed by the entry filer, in a format described as a Line Release Data Loading Sheet. The application must be accompanied by a representative sample of an actual commercial invoice for the products sought to be processed under Line Release. The Line Release Data Loading Sheet must contain the following information with each information element appearing on a separate line.

(a) District or Port where Application is being made.

(b) Initiating Company Information: name, address, city, state, contact person, phone number of contact person, and signature.

(c) Listing of all districts in which the initiating company has filed a similar application for Line Release.

(d) Country of origin codes (ISO codes from Annex B of HTSUS) for the merchandise.

(e) Shipper or manufacturer information: name, address, city, province/state, country, postal code, indication by noting "M" or "S" whether this information relates to a manufacturer (M) or a shipper (S), and manufacturer identification number of the shipper or manufacturer.

(f) Importer information (if importer is different than filer): name, address, city, state and country, zip code, importer number, bond number, and surety code.

(g) Entry filer information: name, importer number, filer code, bond number, and surety code.

(h) Product information: product description, manifest unit of measure, HTSUS number for particular product or range of HTSUS numbers for multiple products for which Line Release is sought.

(i) Election of whether the Line Release transaction is to be considered an entry or an immediate delivery.

§ 142.43 Line Release application approval process.

(a) *District review.* The District Director shall review each Line Release application to determine whether the shipments qualify for Line Release processing. The District Director may contact the applicant for further information, if necessary. An application that fails to elect whether the Line Release transaction is to be considered an entry or an immediate delivery will be returned to the applicant. If all required information is submitted, the application will be forwarded to Headquarters for final processing.

(b) *Assignment of C–4 Codes.* A C–4 Code (Common Commodity Classification Code), which is a unique code identifying the shipper or

manufacturer, importer, entry filer, and the product for each Line Release shipment, shall be assigned by Headquarters to each application approved for Line Release. Headquarters shall annotate each approved application With a C–4 Code and return the application to the District Director who shall return the approved application to the entry filer.

(c) *Denial of Line Release application.* An application for Line Release denied by a District Director shall be forwarded to Headquarters to determine whether the application has been approved in other districts. If approved in other districts, Headquarters shall note on the application the districts where approved and return the application to the district director for reconsideration. A denied application shall be returned to the entry filer by a District Director; such an application shall not be annotated with a C–4 Code and shall be noted denied.

§ 142.44 Entry number range.

After an application for Line Release has received final approval from Headquarters, filers must provide the District Director, in writing, with a range of entry numbers for use in the system so that an entry number can be assigned automatically to each Line Release transaction. For the purposes of this subpart, "entry number" when the release is an immediate delivery merely refers to the Line Release transaction number; this number does not become the actual entry number until an entry for the merchandise released under the immediate delivery procedure is filed. A separate range must be provided for each Line Release site in the district. These entry numbers shall be used for assignment within the Line Release system. Entry filers shall not assign these numbers to other entry transactions.

§ 142.45 Use of bar code by entry filer.

(a) *Printing of C–4 Code.* Upon receipt of an approved Line Release application, the entry filer, in accordance with instructions from the District Director, shall preprint invoices with the C–4 Code in bar code and alpha numeric format or print labels with the necessary information. Bar codes shall be printed in accordance with the specifications stated in Customs Publication 561 (*Line Release Overview*). Labels or preprinted invoices also shall state the name of the shipper or manufacturer of the product and the name of the importer of record, if other than the entry filer, above the bar code and the name of the entry filer and a product description below the bar code.

(b) *Multiple commodity processing.* Multiple commodity processing allows more than one product to be released under one entry number. The shipper/manufacturer, importer of record and the entry filer must be the same. The product description is the only variable allowed. The commodities should be listed on one invoice with C–4 Code labels for each commodity attached to the invoice.

(c) *Distribution of labels.* If labels are used, the labels shall be affixed to the invoices in accordance with instructions from the District Director. The entry filer may either affix the labels or distribute the labels to

the shippers/manufacturers and instruct them in the use and placement of the labels.

§ 142.46 Presentation of invoice and assignment of entry number.

(a) *Presentation of invoice.* When merchandise that has been approved for Line Release is imported at a Line Release site, the carrier, importer or filer shall present Customs with an invoice with the bar code or codes printed or affixed and, according to the method of transportation the appropriate manifest document.

(b) *Verification of data.* If after scanning the bar code at the Line Release site, the Customs officer verifies the data on the bar code with the information on the invoice, he will key the quantity on the invoice and an entry number will be automatically assigned to the transaction. If there are any differences between the system data and the invoice and bar code, including any differences in entry filer, the Customs officer shall order an examination.

(c) *Other agency documentation.* If the Line Release shipment requires other agency documentation, the Customs officer at the Line Release site will be alerted to that requirement electronically when he verifies the data on the bar code with the information on the invoice. If the required form is presented to the officer with the documentation package, the shipment may be released.

§ 142.47 Examinations of Line Release transactions.

(a) *General.* Merchandise imported under Line Release generally may be released without further Customs processing. Customs, however, may choose to inspect any Line Release shipment. Examinations may be either specifically ordered by the Customs officer or random.

(b) *Voiding of Line Release Transaction.* Customs may void a Line Release transaction because of an examination. If this occurs, Customs will return the invoice to the carrier, and the entry filer, in order to enter merchandise, shall prepare and submit either a CF 3461 or 3461 Alternate.

§ 142.48 Release procedure.

(a) *General.* When the Customs officer at the Line Release site determines that a shipment is ready for release, release data, consisting of the entry number, the date and time of release, the inspector's badge number, the quantity and unit of measure, and the C–4 Code will be printed on the invoice and the manifest document. The invoice shall be returned to the entry filer and the manifest document shall be retained by Customs.

(b) *Notification to non-ABI Participants.* The returned invoice with the release data shall be the release notification to non-ABI participants.

(c) *Notification to ABI participants.* If the Line Release entry filer is an operational ABI participant, the filer shall receive an electronic notification of the release consisting of the importer of record number, the

district/port of entry, the filer code, the entry number, the date and time of release, the manufacturer code, the quantity and unit of measure, the release site, the HTSUS number(s), the C–4 Code and the country or countries of origin.

§ 142.49 Deletion of C–4 Code.

(a) *By Customs.* A District Director may temporarily or permanently delete an entry filer's C–4 Code without providing the participant with any justification and without prior notification in cases of willfulness or when public health, interest or safety so requires, thereby revoking the filer's use of Line Release.

(b) *By entry filer.* Entry filers may delete C–4 Codes from Line Release by notifying the District Director in writing on a Deletion Data Loading Sheet. Such notification shall state the C–4 Code which is to be deleted, the district or port where the C–4 Code is to be deleted and the reason for the requested deletion. A copy of the originally approved Data Loading Sheet must be submitted with the Deletion Data Loading Sheet. If only a temporary deletion is desired, the filer shall state the requested effective date for the deletion and the date the C–4 Code is requested to be returned to Line Release processing.

§ 142.50 Line Release data base corrections or changes.

The applicant shall notify the District Director of any changes in names, importer or filer numbers or bond information on a Line Release Data Loading Sheet as soon as possible. Notification shall be accomplished by the submission of a copy of the original loading sheet with a Correction Data Loading Sheet.

§ 142.51 Changing election of entry or immediate delivery.

An applicant who has already received a C–4 Code and wishes to change the election chosen on his Line Release application as to whether the release should be considered an entry or an immediate delivery must submit a letter requesting such change to the district director where the C–4 Code is used. This letter must include the C–4 Code to be changed and the date the change is to be effective. If the requested change is for a temporary time period, the letter shall include the date the releases are to return to the release type originally requested. Applications that fail to state the effective dates of the changes requested will be returned to the applicant.

§ 142.52 District-wide and multiple district acceptance of Line Release.

(a) *District-wide processing.* If a C–4 Code has been approved by a district, the C–4 Code may be used at any Line Release site in the district.

(b) *Multiple district processing.* In order for a C–4 Code approved in one district to be used in another district, the entry filer must submit an application to the District Director of the other district. While uniform criteria shall be applied to approving similar shipments for Line Release in all districts, a District Director may exercise his discretion to deny

Line Release in a district even though a similar shipment may be approved in another district.

CAROL HALLETT,
Commissioner of Customs.

Approved: July 19, 1991.
PETER K. NUNEZ,
Assistant Secretary of Treasury.

[Published in the Federal Register, August 28, 1991 (56 FR 42568)

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

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* Acting as Chief Judge, effective May 1, 1991, pursuant to 28 U.S.C. § 253d.

Decisions of the United States Court of International Trade

(Slip Op. 91–67)

TOSHIBA CORP. AND TOSHIBA AMERICA INFORMATION SYSTEMS, INC., PLAINTIFFS *v.* U.S. DEPARTMENT OF COMMERCE, DEFENDANT, AND AMERICAN TELEPHONE AND TELEGRAPH CO., DEFENDANT-INTERVENOR

Court No. 90–08–00441

[Affirmed.]

(Dated July 31, 1991)

Mudge, Rose, Guthrie & Ferdon (*Jeffrey S. Neeley* and *N. David Palmeter*) for plaintiffs.

Stuart M. Gerson, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, (*A. David Lafer*), *Tina M. Stikas*, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel, for defendant.

Covington & Burling (*Harvey M. Applebaum, O. Thomas Johnson, Jr., Sonya D. Winner* and *Susan L. Burke*) for defendant-intervenor.

OPINION

RESTANI, *Judge:* Plaintiffs, producers and importers of small business telephone systems from Japan ("Toshiba"), challenge a scope ruling by the United States Department of Commerce ("Commerce") issued on July 27, 1990. Doc. 21. Specifically, Toshiba contests the part of the ruling in which Commerce found that Toshiba's 6000 series and 6500 series telephone sets are not "dual-use subassemblies" and, therefore, fall within the scope of *Certain Small Business Telephone Systems and Subassemblies Thereof from Japan,* 54 Fed. Reg. 50,789 (December 11, 1989) (antidumping duty order). Toshiba argues that such telephones are not within the scope of the antidumping order and that Commerce's scope determination is not supported by substantial evidence on the record and is not in accordance with the antidumping law.

For the following reasons, the court finds that Commerce properly included the 6000 series and 6500 series telephone sets in the antidumping duty order. Plaintiffs' motion for judgment on the agency record is, therefore, denied and this action is dismissed.

BACKGROUND

I. *The Less Than Fair Value Investigation and Determination:*

On December 28, 1988, American Telephone and Telegraph Company ("AT&T"), together with Comdial Corporation, filed a petition with Commerce and the United States International Trade Commission

requesting that these two agencies initiate an antidumping investigation with respect to imports of small business telephone systems and subassemblies thereof from Japan, Korea, and Taiwan. Public Record Document ("P.R. Doc.") 1. In its petition, AT&T defined the subject merchandise as "[t]elephone systems with intercom or internal calling capability and total nonblocking port capacities of between 2 and 256 ports, and discrete subassemblies *designed and dedicated for use in such systems.*" *Id.* at 7 (emphasis added). AT&T explained that a subassembly was "designed" or "dedicated" for use in a particular small business telephone system if it was designed or dedicated for use with the central elements of those systems. Further, AT&T stated, these subassemblies should be considered "dedicated" if they "function fully only when operated through the control unit of the system or systems for which they are designed." *Id.* at 8 n.5.

Commerce proceeded to initiate antidumping investigations on imported small business telephone systems and subassemblies from the countries named in the petition. In *Certain Small Business Telephone Systems and Subassemblies Thereof from Japan,* 54 Fed. Reg. 3,516 (January 24, 1989) (initiation of antidumping duty investigation), Commerce described the covered merchandise as "telephone systems whether complete or incomplete, assembled or unassembled, with intercom or internal calling capability and total non-blocking port capacities of between 2 and 256 ports, and discrete subassemblies thereof *designed and dedicated for use in such systems.*" *Id.* at 3,517 (emphasis added).

Notice of the preliminary affirmative determination by Commerce was published on August 3, 1989. *See Certain Small Business Telephone Systems and Subassemblies Thereof from Japan,* 54 Fed. Reg. 31,978 (August 3, 1989) (preliminary determination of sales at less than fair value). In that notice, Commerce noted that a number of ambiguities existed in the scope language. Accordingly, Commerce stated that the language describing the subject subassemblies would be "clarified" to read as follows:

> Certain small business telephone systems and subassemblies thereof are telephone systems, whether complete or incomplete, assembled or unassembled, with intercom or internal calling capability and total non-blocking port capacities of between 2 and 256 ports, and discrete subassemblies *designed for use in such systems.* A subassembly is "designed" for use in a small business telephone system if it functions to its full capability only when operated as part of a small business telephone system.

Id. at 31,979 (emphasis added). Commerce defined dual-use subassemblies as "subassemblies that function to their full capability when operated as part of a large business telephone system as well as a small system." *Id.* at 31,980. Since dual-use subassemblies be definition were not, under Commerce's definition, "designed" for use in small business telephone systems, such assemblies were excluded from the scope of the investigation.

The final determination was published by Commerce on October 17, 1989. *See Certain Small Business Telephone Systems and Subassemblies Thereof from Japan,* 54 Fed. Reg. 42,541 (October 17, 1989) (final determination of sales at less than fair value). The imported products covered by the investigation were described by Commerce with language identical to that used in the preliminary determination.

The International Trade Commission ultimately issued its final affirmative injury determination and on December 11, 1989, Commerce published the antidumping duty order. *See Certain Small Business Telephone Systems and Subassemblies and Subassemblies Thereof from Japan* (antidumping duty order), *supra.*

II. *The Ruling Concerning the Scope of the Antidumping Duty Order:*

After issuance of the antidumping duty order, Toshiba requested Commerce to clarify the scope of the order. P.R. Doc. 6. Toshiba asked for a formal determination that its Perception II and Perception ex systems were outside of the dumping order because these systems were large business telephone systems containing more than 256 non-blocking ports.[1] Toshiba also requested Commerce to determine that thirteen different telephone sets (labelled the "6000 series" and the "6500" series)[2] it manufactured "function[ed] to their full capability when operated as part of a large business telephone system as well as [when operated as part of] a small business telephone system, and therefore [were] outside the scope of the dumping order." *Id.* at 2. This second request – that Commerce determine that these two series are "dual use" subassemblies – is the subject of this action.

Along with its request for a scope ruling, Toshiba submitted an affidavit of Mr. Robert E. Krumland, a Supervisor of Systems Engineering at Toshiba America Information Systems. *Id.* at App. D. Mr. Krumland explained that he examined the telephone sets at issue in light of Commerce's definitions of "designed for use" and "dual use." He stated that the telephones at issue functioned to their full capacity in large business telephone systems as well as in small business telephone systems.

On January 31, 1990, Commerce began a scope investigation pursuant to 19 C.F.R. § 353.29(b). P.R. Doc. 7. On February 22, 1991, AT&T submitted a letter in which it argued that the telephone sets in question did not provide the same level of functionality when used with the Perception systems (the large business telephone systems) as they provided when used with the Strata line (the small business telephone systems). P.R. Doc. 8 at 3. AT&T supported their claim with an affidavit of Mr. Steven G. Miller, a Supervisor and Member of the Technical Staff in the Systems Engineering Department of AT&T Bell Laboratories. Mr. Miller found several features and one display function that were avail-

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[1] Ultimately, Commerce ruled that the Perception systems were large business telephone systems and therefore, were excluded from the antidumping order. *See* P.R. Doc. 21 at 7. This portion of the scope determination is not at issue.

[2] The 600 series encompasses models EKT-600-N, EKT 600-NM, EKT 6015-H, EKT 6015-S, EKT 6025-H, EKT-6025-SD, EKT 6025-S, and HDSS 6060. P.R. Doc. 6 at 2. The 6500 series refers to models EKT 6520-SD, EKT 6510-S, EKT 6510-H, EKT 6520-H and HDSS 6560. *Id.*

able in the small, but not in the large business telephone systems: First, the "off-hook call announce" feature was available in a Strata system when an optional attachment was used, but unavailable in a Perception system. Second, the telephone sets could provide background music through the station speaker when connected to a Strata system, but not when connected to a Perception system. Finally, three buttons that controlled the display function on two of the telephone sets[3] were operational when used with at least the Strata DK series, but were inoperative when the sets were used with the Perception II.

On March 8, 1990, Toshiba responded to AT&T's comments. P.R. Doc. 10. Although it categorically stated that "the functions that the telephone is capable of performing are exactly the same, regardless of whether the telephone is attached to a small system or to a large system," *id.* at 3–4, Toshiba argued that the test of full functionality depends on the software available at the particular time. Along with the letter, Toshiba submitted two affidavits by Mr. Krumland in which he admitted the following features functioned with the Strata systems, but not the Perception systems:

1. the mode button on the 6020–SD and 6520–SD sets (*Id.* at App. A para. 8.);
2. background music (*Id.* at App. B para. 5);[4]
3. "I-called" LED flashing (*Id.* at App. B para. 6);
4. toll restriction override by system speed dial (*Id.* at App. B. para. 7);
5. toll restriction override control (*Id.*);
6. automatic busy redial (*Id.*); and
7. voice or tone signalling (*Id.*).

In another letter dated April 13, 1990, Toshiba argued that the off-hook call announce feature was provided by the circuit card and therefore, was covered by the circuit card portion of the dumping order, not the telephone set portion. P.R. Doc. 14 at 2. Toshiba further explained that it offered different software features for the Strata and Perception systems for marketing reasons.

Additional comments were filed by AT&T on April 19, 1990. P.R. Doc. 15. AT&T urged Commerce not to ignore all features and functions provided by circuit cards because this would exclude virtually all telephone sets on dual-use ground. Instead, AT&T argued that Commerce should consider whether Toshiba's 6000 and 6500 series telephone sets come equipped either with circuits or connectors that are funtionless when the set is used with a Perception system. In short, AT&T urged Commerce to base its dual-use analysis on the state of the telephone set hardware, not on the state of the telephone set after software changes.

Commerce officials met with plaintiffs on May 18, 1990 and discussed the features of the subject telephone sets. P.R. Doc. 16. On May 21, 1990,

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[3] The 6020–SD and 6520–SD models.

[4] Mr. Krumland stated that for marketing reasons Toshiba decided not to offer background music played through the station speakers with the Perception systems.

Toshiba filed a letter in which it maintained that all of the feature differences may be explained either by the fact that they involve software in the central processing unit of the Perception system, which has nothing to do with the capabilities of the system, or by the fact that they involve circuit cards which are covered by the circuit card subassembly portion of the dumping order. P.R. Doc. 17 at 2. AT&T submitted a letter in response on May 31, 1990, in which it continued to argue that full capability should be defined with respect to the ability of the system in the sense of actual hardware, rather than the potential ability of the system in terms of software. P.R. Doc. 18 at 2–3.

On July 27, 1990, Commerce determined that the telephone sets in question did not qualify as dual-use subassemblies. P.R. Doc. 21 at 10. Commerce reasoned that since the antidumping order contained no exception for features that are offered in small systems and not in large systems as a result of the availability of software for that particular system, Toshiba's emphasis on potential software is misplaced. Commerce found that "[t]he fact is that the telephone sets in question are capable of providing certain features that are not presently functional when the telephones are used with the Perception systems. The telephone sets in question, therefore, are not 'dual-use' subassemblies * * *." *Id.* Accordingly, Commerce determined that Toshiba's 6000 and 6500 series telephone sets fell within the scope of the antidumping duty order.

Analysis

In their brief, plaintiffs challenge both the scope definition set forth in the antidumping duty order and the application of the scope definition to the 6000 and 6500 series telephone sets. Although plaintiffs seem to request only review of the July 27, 1990 scope ruling, most of their arguments challenge the change in language between the initiation of the investigation stage and the preliminary determination stage. The court, therefore, will address the challenge to the underlying scope definition and then examine the telephone sets at issue to determine whether they were properly found to fall within the antidumping duty order.

I. *The Scope Definition:*

In AT&T's petition and the initiation of investigation, the merchandise subject to investigation was defined as "discrete subassemblies * * * designed and dedicated for use in such [small business telephone] systems." *Supra* at 3. This language indicated that the only merchandise covered by the investigation were subassemblies that were specifically designed and dedicated for use in a particular small business telephone system. In its preliminary and final determinations, Commerce omitted the word "dedicated," and stated that for subassemblies to be considered "dual-use" they must "function to their full capability when operated as part of a large business telephone system as well as a small system." *See supra* at 4. Plaintiffs argue that Commerce arbitrarily and probably unintentionally changed the scope of the investigation

without any notice or explanation to the parties. As such, plaintiffs contend, the antidumping duty order is contrary to law.

As a procedural matter, the clarification of the language explaining the scope of the investigation was a part of the final determination and, as such, should have been challenged within thirty days of the publication of the antidumping duty order. *See* 19 U.S.C. § 1516a(a)(2)(A) (1988). Toshiba never challenged the language, instead it requested a scope determination on January 23, 1990, forty three days after publication of the antidumping duty order.

Plaintiffs' assertion that the significance of the omission of the word "dedicated" was not "readily apparent" at the time of the preliminary investigation, Plaintiffs' Brief at 9, is without merit. The court notes that in its preliminary determination Commerce plainly stated: "We note that a number of ambiguities existed in the scope language previously published in the Notice of Initiation with regard to the definition of subassemblies. We therefore have clarified the language describing the subassemblies under investigation." 54 Fed. Reg. at 31,980. The court is unable to imagine how Commerce could have been more clear in calling attention to its scope language clarification. Furthermore, Toshiba did not develop the products at issue at some later date. It should have known which of its products could be affected.[5] Thus, plaintiffs' argument that they were not in a position to address the scope definition is unpersuasive. In the interests of administrative efficiency, any questions concerning Commerce's authority to refine a scope definition at a particular stage of the investigation should have been brought up at that time. Because plaintiffs were in a position to do so, but did not object in a timely manner to the scope language used by Commerce in its preliminary and final determinations, plaintiffs must accept that scope definition for purposes of this action.

Assuming *arguendo* that plaintiffs may raise this issue now, the court finds that Commerce's clarification of the language in the preliminary determination was an appropriate exercise of its discretion. A necessary corollary to the principle that Commerce has inherent authority to define the scope of an antidumping duty investigation is that Commerce has the authority "to redefine and clarify the parameters of its investigation." *NTN Bearing Corp. of America v. United States,* 14 CIT ____, ____, 747 F. Supp. 726, 731 (1990) (citations omitted). *See also Torrington Co. v. United States,* 14 CIT ____, 745 F. Supp. 718 (1990), *aff'd,* No. 91–1020 (Fed. Cir. July 3, 1991).

In its petition AT&T stated its definition of "dedicated" as "subassemblies [that] * * * *function fully* only when operated through the control unit of the system or systems for which they are designed." P.R. Doc. 1 at 8 n.5 (emphasis added). This was the same principle which Commerce elucidated in its preliminary determination. In this case, the

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[5] Of course Toshiba cannot anticipate an unreasonable application of the language to its products. This is a question which may be addressed now and is taken up in the second portion of this opinion.

court finds that the word "dedicated" was eliminated, not to change the scope of the investigation, but to resolve any ambiguities that might have arisen during the early stages of the investigation. It was well within the discretion of Commerce to clarify the scope language by eliminating a word and adding an explanatory phrase as it did, in order to depict more clearly the scope of the investigation.

II. *The Scope Ruling:*

The crux of this case is whether substantial evidence supports Commerce's determination that plaintiffs' 6000 series and 6500 series telephone sets are not dual-use telephones. The court has jurisdiction over a challenge to a scope ruling pursuant to 19 U.S.C. § 1516a(a)(2)(B)(vi) (1988).[6] For the reasons set forth in the following paragraphs, the court finds Commerce's application of the "full capability" requirement is supported by substantial evidence on the record.

As indicated, in reaching its determination, Commerce carefully reiterated the scope of the antidumping duty order by stating "'[a] subassembly is "designed" for use in a small business telephone system if it functions to its full capability only when operated as part of a small business telephone system.'" P.R. Doc. 21 at 6 (quoting 54 Fed. Reg. 50,789). Commerce noted that those subassemblies that function to their full capability when operated as part of a large business telephone system as will as a small business telephone system would be considered dual-use subassemblies, and therefore, excluded from the scope of the order. In particular, the issue was whether the 6000 series and the 6500 series function to their full capacity when operated as part of the Perception systems as well as when operated as part of the Strata systems. *Id.* at 10.

As indicated, in deciding that the subject telephone sets do not operate to their full capability when operated as part of a large business telephone system, Commerce rejected Toshiba's argument that the differences in the features offered are due to the software in the central processing unit of the Perception system and have nothing to do with the capabilities of the telephones or the systems. Commerce observed that the antidumping duty order contained "no exception for features that are offered in small systems and not in large systems as a result of the availability of software for the particular systems." *Id.* Commerce found it compelling that the telephone sets in question are capable of providing certain features when used with Strata systems, but not with the Perception systems.

Commerce supported its conclusion about the different features with two concrete examples of certain functions which are not operational in the Perception systems. First, Commerce noted that Toshiba acknowledged that its telephone sets contains a "mode" key that is not functional with the Perception systems. Second, Commerce observed

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[6] 19 U.S.C. § 1516a(a)(2)(B)(vi) (1988) provides that this court may review:

A determination by the administering authority as to whether a particular type of merchandise is within the class or kind of merchandise described in an existing finding of dumping or antidumping or countervailing duty order.

that the "off-hook call announce" feature is available when the telephones are used with the Strata system if an optional circuit card is installed with the telephone. The Perception systems do not have this capacity. For these two specific reasons, Commerce determined that the subject series do not function to their full capability when used with a large business telephone system. Commerce provided further support for its decision by noting that in Appendix B of Toshiba's March 8, 1990 submission, Toshiba described other features of the subject telephone sets that function when the telephones are used with the Strata system but do not function when they are used with the Perception systems. *See supra* at 7 (listing of all the admittedly different features).

The court finds that substantial evidence exists in the record for Commerce's conclusion that the 6000 series and the 6500 series are not dual-use telephone sets. Commerce concluded that the actual hardware of the subject telephone sets does not operate to its full capability when used with large telephone systems. The court observes that Commerce supported its conclusion with two concrete examples of inadequacies in the functionality of the sets when used in large business telephone systems. Plaintiffs have not offered evidence which would indicate to the court that these features do indeed have the same functionality in large business telephone systems. Like Commerce, the court refuses to delve into potentialities of future software developments. It is not unreasonable for Commerce to base its definition, and ultimately its decision, on the current market and the merchandise actually marketed. It is possible that the subject merchandise could at some point in time function fully in both small and large business telephone systems, however, at this time they are not true dual-use telephone sets.

Accordingly, the court finds Commerce properly applied its previous scope definition to the products at issue. The court, therefore, denies plaintiffs' motion for judgment on the agency record and dismisses this case.

(Slip Op. 91–68)

THE ROYAL THAI GOVERNMENT, THE BANGKOK WEAVING MILLS LTD., THAI AMERICAN TEXTILE CO., LTD., THAI SYNTHETIC TEXTILE INDUSTRY CO., LTD., SAHA UNION CORP., LTD., AND THAI MELON TEXTILE CO., LTD., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 90–12–00707

(Dated August 5, 1991)

MEMORANDUM OPINION AND ORDER

CARMAN, *Acting Chief Judge:* This case having been remanded to the United States Department of Commerce by order of this Court on May 17, 1991, for reconsideration of its decision finding American Yarn

Spinners Association an interested party, and Commerce having rendered its decision on remand and plaintiffs' having no opposition to the Commerce Department's Remand Results; now, in accordance with said decision, it is

ORDERED, ADJUDGED, AND DECREED that the remand determination filed by the United States Department of Commerce on July 3, 1991, be, and the same is hereby affirmed.

NOTE: Pursuant to the court's Procedures for Publication of Opinions and Orders, this order, which amends Slip Op. 91–39, is being published by the Clerk's Office.

(Slip Op. 91–69)

ORBISPHERE CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 87–02–00404

(Dated August 9, 1991)

AMENDED ORDER

MUSGRAVE, *Judge:* The Court, having reconsidered its Order of July 16, 1991 with respect to the reappraisal of the merchandise in question, issues the following amended order in this action. Based upon the Court's earlier findings in this action and upon consideration of defendant's amended calculations communicated to the Court on July 15, 1991, which were accepted by the plaintiff on July 16, 1991, it is hereby

ORDERED, ADJUDGED, AND DECREED that deductive value, as defined in 19 U.S.C. § 1401a(d), is the proper statutory basis for appraisement of the merchandise at issue; that said value is represented by plaintiff's United States price list prices less 65.70% for merchandise imported in 1985, and by plaintiff's United States price list prices less 62.95% for merchandise imported in 1986; and it is further

ORDERED that Customs shall reliquidate the entries in this action in accordance herewith and shall refund to plaintiff any excess duties paid, with interest, in accordance with law, and it is further

ORDERED that the Court's Order of July 16, 1991 is hereby set aside.

(Slip Op. 91–70)

CHINA NATIONAL ARTS AND CRAFTS IMPORT AND EXPORT CORP., TIANJIN BRANCH, NOW KNOWN AS TIANJIN ARTS AND CRAFTS IMPORT AND EXPORT CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 90–04–00170

[Plaintiff challenges dumping margin calculated using value of cotton shop towels from Hong Kong. *Held:* Plaintiff's motion for remand to ITA for redetermination is granted. Hong Kong was improperly selected as surrogate. Indonesia the Philippines, and Malaysia were improperly excluded as possible surrogates in calculating foreign market value.]

(Dated August 15, 1991)

Grunfeld, Desiderio, Lebowitz & Silverman, (David L. Simon and *Bruce M. Mitchell), Philip Gallas* and *Jack Simmons, III,* on brief) for plaintiff.

Stuart M. Gerson, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *(Velta A. Melnbrencis), (Robert J. Heilferty,* Attorney-Advisor, U.S. Department of Commerce, Of Counsel) for defendants.

MEMORANDUM OPINION

I. *Introduction:*

MUSGRAVE, *Judge:* This case involves one predominate issue: by what methods may market economy countries ("surrogates") be selected by the International Trade Administration ("ITA" or "Commerce") to determine foreign market value in an antidumping administrative review when the producing country has a state-controlled economy. In the second administrative review of cotton shop towels from the People's Republic of China ("PRC"), ITA chose Hong Kong as surrogate and determined that shop towels from the PRC were being dumped. *Shop Towels of Cotton from the People's Republic of China; Final Results of Antidumping Duty Administrative Review,* 55 Fed. Reg. 7756 (Mar. 5, 1990) ("Determination"). Plaintiff Tianjin Arts and Crafts Import and Export Corporation ("CNART") argues that the selection of Hong Kong was based on improper application of ITA practices and urges that ITA use Indonesia, Malaysia or the Philippines as surrogates. Defendant maintains that the determination should stand, although the parties agree that it should be remanded for recalculation to correct certain minor errors.

II. *Factual Background:*

In 1983, Commerce investigated imports of cotton shop towels from the PRC and found that they were being sold at less than fair value.[1] In the initial investigation, ITA determined that no shop towels were produced in Hong Kong, after a visit to Hong Kong by an ITA investigator. Public Document 87, at 13–14. Commerce based the foreign market value on the constructed value of the merchandise, with factors of production valued in a non-state controlled economy country (Indonesia)

[1] *Final Determination of Sales at Less Than Fair Value; Shop Towels of Cotton from the People's Republic of China,* 48 Fed. Reg. 37,055 (August 16, 1983) ("Initial Determination").

which was "determined to be reasonably comparable in economic development to the PRC."[2] The dumping margin was set at 38.8 per cent *ad valorem*.[3]

During the first administrative review, ITA determined the dumping margin using the best information available because the PRC exporters refused to provide information.[4] Commerce again considered using Hong Kong as a surrogate, but did not because it found that imports from Hong Kong were actually re-exports from other countries.[5]

Commerce began a second administrative review in November, 1987, covering the period October 1, 1986 through September 30, 1987.[6] Because ITA was required to base foreign market value on market economy prices, under 19 C.F.R. § 353.8 (1988),[7] Commerce requested comments on potential surrogates, and CNART proposed several countries. Commerce found that six countries were at a comparable stage of economic development to the PRC.[8] Two of these countries[9] were inappropriate because they had been determined to subsidize exports, including to some extent cotton shop towel exports. ITA dismissed each of the other proposed surrogates for various reasons, discussed infra, and found a dumping margin (for CNART) of 32.12 per cent, based on the unit values of cotton shop towels imported from Hong Kong. Determination, at 7759 and 7757.

III. *Standard of Review:*

In a review of a final determination of the ITA, this Court must decide whether the determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1991). "Substantial evidence on the record means more than a mere scintilla and such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, taking into account the entire record, including whatever fairly detracts from the substantiality of the evidence." *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562, 2 Fed. Cir. (T) 130, 136 (1984) (footnote omitted). However, judicial review of the agency determination is a limited one. "An agency's 'interpretation of the statute need not be the *only* reasonable interpretation or the one the Court views as the most reasonable.'" *I.C.C. Indus., Inc. v. United States*, 812 F.2d 694, 700, 5 Fed. Cir. (T) 78, 85 (1987), *quoting Consumer Products Div., S.C.M. Corp. v. Silver Reed America, Inc.*, 753 F.2d 1033, 1039, 3 Fed. Cir. (T) 83, 90 (1985) (empha-

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[2] *Id.*, 48 Fed. Reg., at 37,056.

[3] *Shop Towels of Cotton from the People's Republic of China; Antidumping Order*, 48 Fed. Reg. 45,277 (Oct. 4, 1983).

[4] *Shop Towels of Cotton from the People's Republic of China; Final Results of Antidumping Administrative Review*, 50 Fed. Reg. 26,020, 26,021–22 (June 24, 1985).

[5] *Id.*, 50 Fed. Reg. 26,024.

[6] *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 52 Fed. Reg. 44,161 (Nov. 18, 1987).

[7] A revised version of the regulation regarding calculation of foreign market value from state-controlled-economy countries is now found at 19 C.F.R. § 353.52 (1990).

[8] India, Indonesia, Pakistan, the Philippines, Sri Lanka, and Thailand. Opposition, at 18.

[9] Pakistan and Sri Lanka. *Id.*

sis in original). Keeping these standards in mind, the Court finds that the ITA made several findings which are unsupported by substantial evidence.

IV. *ITA Incorrectly Chose Hong Kong As Surrogate as a Matter of Law:*

ITA chose Hong Kong as surrogate despite its own regulations preferring comparable economies and plentiful evidence that other countries would have provided a more comparable price comparison.[10] Generally, if no adequate information on production costs in the state controlled economy is available, ITA "shall determine" the foreign market value based on the price at which comparable merchandise produced in a market economy country at a similar level of economic development, is sold in the United States or other countries.[11] Commerce concedes that Hong Kong is not economically comparable to the PRC. Determination, at 7758. Therefore, the methodology Commerce used to reach the unlikely selection of Hong Kong must be reviewed.

The other proposed surrogates were deemed ineligible because their shop towel producers might have benefited from export subsidies. *Id.* ITA selected Hong Kong because of the *possibility* that there may have been production there:

> Conclusions reached by the Department concerning Shop Towel production in Hong Kong in an earlier period do not persuade us that the import data for this review period are incorrect. Even if there were no production in Hong Kong in an earlier period, this does not preclude production in a later period.
>
> Determination, at 7758.

CNART argues that the ITA had no concrete information on which to base a finding of cotton shop towel production in Hong Kong. Brief in support, at 51. CNART objects strenuously to the selection of Hong Kong as the surrogate economy because shop towel prices are much higher there than in the proposed surrogates. CNART's Reply Brief ("Reply"), fn. 1, at 3. Defendant argues that a Census Bureau Report IM–146 for the period under investigation shows substantial imports

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[10] 19 C.F.R. § 353.8(b) (1988). The regulations provide that foreign market value:

> shall be determined, to the extent possible, from the prices or costs in a non-state-controlled-economy country or countries at a stage of economic development comparable to the state-controlled-economy country from which the merchandise is exported. Comparability of economic development shall be determined from generally recognized criteria, including per capita gross national product and infrastructure development (particularly in the industry producing such or similar merchandise).
>
> (2) If no non-state-controlled economy country of comparable economic development can be identified, then the prices; or constructed value as determined from another non-state-controlled-economy country or countries other than the United States shall be used, suitably adjusted for known differences in the costs of material and labor.

19 C.F.R. § 353.8(b)(1–2) (1988). Section 353.8 has since been amended.

[11] 19 U.S.C. § 1677b(c)(2). It provides:

> If the administering authority finds that the available information is inadequate for purposes of determining the foreign market value of merchandise under paragraph (1), the administering authority shall determine the foreign market value on the basis of the price at which merchandise that is—
>
> (A) comparable to the merchandise under investigation, and
>
> (B) produced in one or more market economy countries that are at a level of economic development comparable to that of the non-market economy country,
>
> is sold in other countries, including the United States.

19 U.S.C. § 1677b(c)(2) (1991).

from Hong Kong, and infers from it that shop towels were in fact produced there. Opposition, at 28. However, title IM–146 apparently does not state that production took place in Hong Kong, but merely lists the number and value of shop towels imported from Hong Kong.[12] In an earlier investigation, ITA found that shop towels imported from Hong Kong were produced elsewhere and were re-exported from Hong Kong.[13]

Although ITA could find no Hong Kong shop towel production in an on-site verification conducted prior to the Initial Determination, a corresponding report showed substantially more shop towel imports from Hong Kong than shown in the IM–146 which Defendant now points to.[14] The verified finding of no production should be presumed correct. *Hannibal Indus., Inc. v. United States,* 710 F. Supp. 332, 337, 13 CIT ____, ____ (1989); 28 U.S.C. § 2639(a)(1) (1991). Instead of checking the newer IM–146 data against its own findings, Commerce presumed that Hong Kong production had recommenced. Because the earlier FT–246 report shows greater imports of cotton shop towels, using Commerce's logic, there was more production in 1982 than during the period investigated here, despite the verification of no production.

The substantiality of the evidence presented to counter the original finding of no Hong Kong production is dubious. The IM–146 data is presumably correct as to the amount of shop towels imported from Hong Kong, but that does not establish that they were produced there. There is no concrete evidence on the record that shop towels were actually produced in Hong Kong during the investigation period. The assumption that there now is production is unsupported by substantial evidence. As a matter of law, administrative findings cannot be upheld if they are not based on substantial evidence. Carlisle & Rubber Co. v. United States, 622 F. Supp. 1071, 1082, 9 CIT 520, 533 (1985). Therefore ITA's finding that cotton shop towels were produced in Hong Kong cannot stand and Hong Kong may not be used as surrogate for calculation of foreign market value.

V. *ITA Policy to Exclude Countries From Surrogate Status Where Subsidies May Possibly Exist is Erroneous:*

ITA rejected several of the proposed surrogates because of a policy to exclude countries whose exports might benefit from subsidies. Determination, at 7758. For example, CNART proposed Malaysia as a surrogate but ITA rejected it without indicating why in the Determination. CNART maintains that ITA unlawfully rejected the proposed surrogates because subsidies were "potentially available," and not because any subsidies were actually used. Brief In Support, at 19. The govern-

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[12]Reply, at 24. The IM–146 was not included with the administrative record.

[13]*Shop Towels of Cotton from the PRC; Final Results of Antidumping Administrative Review,* 50 Fed. Reg., at 26,024.

[14]U.S. Department of Commerce, *U.S. Imports for Consumption and General Imports,* FT–246, at 1–167 (1982)(T.S.U.S. 366.2740), Reply, at 24.

ment now argues that ITA used the "consistent practice * * * [of rejecting countries] subject to an antidumping order on comparable merchandise." Opposition, at 13. Of the proposed surrogates with purported comparable economic development, only Pakistan and Sri Lanka were rejected on these grounds.[15]

Commerce's rejection of several surrogates based on the possibility that the shop towel industries might benefit from subsidies is not based on substantial evidence in this case. ITA chose to assume subsidies where no concrete evidence or final determinations of subsidies existed. ITA states in the Determination that "[t]here Is no evidence on the record that merchandise from other surrogate countries [other than Pakistan and Sri Lanka] is unfairly traded." Determination, at 7757.

a. *Malaysia Was Wrongfully Rejected Based on a Prior Finding of a De Minimis Export Subsidy:*

Government counsel argues that Commerce rejected Malaysia because of a favorable final determination on carbon-steel rod, although this was not explicitly spelled out in the Determination.[16] The only indication in the Determination as to why Malaysia was rejected is the statement that "[n]on-product-specific export subsidies *may also be available* to exporters of shop towels." Determination, at 7759 (emphasis added). Government counsel concedes that only a finding of export subsidies, not domestic subsidies, should exclude a country from surrogate status. CNART argues that the export subsidy found in the Malaysian carbon steel rod determination should be disregarded because it was *de minimis*.[17] The government argues that because the Malaysian export subsidy program *could* have been used by cotton shop towel producers (although there is no evidence on the record that it was), it could have been used to an extent that would produce a subsidy. Although only one case in five investigations[18] of Malaysian imports found subsidies, and that case[19] found only *de minimis* export subsidies, government counsel wants to provide Commerce the discretion to assume that the Malaysian shop towel industry might possibly use that *de minimis* export subsidy to a countervailable extent.

Plaintiff counters that such reasoning was entirely speculative, and complains that this constitutes a "mere possibility" standard, not based on any factual findings. The Court agrees. *Asociacion Colombiana de Exportadores de Flores v. United States,* 704 F. Supp. 1114, 1117, 13 CIT

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[15] Determination, at 7756.

[16] *Final Affirmative Countervailing Duty Determination; Carbon Steel Wire Rod from Malaysia,* 51 Fed. Reg. 29,145 (Aug. 14, 1986).

[17] *i.e.* less than .50 per cent margin.

[18] The cases with negative determinations are: *Final Negative Countervailing Duty Determination, Certain Textile Mill Products and Apparel from Malaysia,* 50 Fed. Reg. 9852 (Mar. 12, 1985); *Final Negative Countervailing Duty Determination, Certain Steel Wire Nails from Malaysia,* 54 Fed. Reg. 36,841 (Sept. 5, 1989); *Final Negative Countervailing Duty Determination, Thermostatically Controlled Appliance Plugs and Probe Thermometers Therefor from Malaysia,* 53 Fed. Reg. 50,059 (Dec. 13, 1988); *and, Final Negative Countervailing Duty Determination; Welded Carbon Steel Pipe and Tube Products from Malaysia,* 53 Fed. Reg. 46, 904 (Nov. 21, 1988).

[19] *Final Affirmative Countervailing Duty Determination; Carbon Steel Wire Rod from Malaysia,* 53 Fed. Reg. 13,303 (Apr. 22, 1988).

____, ____ (1989), aff'd, 901 F.2d 1089 (Fed. Cir. 1990) ("Speculation is not support for a finding * * *."). This type of conjecture is exactly the type of reasoning the substantial evidence standard aims to prevent, and is totally unsupported by substantial evidence. ITA may not rely on *de minimis* export subsidies to disqualify Malaysia from use as a surrogate to calculate foreign market value.

b. *Commerce May Not Exclude Countries From Surrogacy Based on Preliminary Findings of Export Subsidies:*

CNART claims they have no way of protecting their interests from the indiscriminate use of preliminary findings by ITA. Interested parties may only appeal *negative* preliminary determinations under 19 U.S.C. § 1516a (1991). Only *final* determinations may be reviewed. 19 U.S.C. § 1516a(a)(2)(B). Preliminary results are presumably less reliable than final results of investigations or administrative reviews. Preliminary results are reviewed and commented upon by interested parties before becoming final.[20] Hearings are held, if requested.[21] ITA uses the time between preliminary and final determinations to correct and adjust its preliminary findings and reach more accurate conclusions in the final determination. *Tehnoimportexport v. United States,* Slip Op. 91–45, at 10. ITA's use of preliminary determinations which did not become final because of the withdrawal of the petition is analogous to citing cases which become moot while *sub judice.* In this case, the preliminary determinations were, in effect, mooted by Indonesia and the Philippines' accession to the GATT Subsidies Code. Under the new circumstances, the threshold for obtaining an affirmative determination had risen above the level plaintiff was willing to attempt to overcome. In effect, the law changed, thus mooting the preliminary determination. The Court cannot perceive why mooted preliminary determinations should have any force or effect, however remote. They should be treated like court cases which become moot while awaiting judicial design: they should be vacated.

Commerce states that its consistent practice has been to reject any surrogate candidate subject to an antidumping order on comparable merchandise, or determined to provide export subsidies. Opposition, at 13. Both are logical standards often used to exclude surrogates. A surrogate which is subsidizing exports or which is under investigation on analogous merchandise should be avoided because its export data may be tainted. Yet Commerce expanded that practice when applying it to this case:

> It is the Department's general practice when using prices of U.S. imports to disregard imports from certain countries in determining foreign market value because of the *possibility* that such imports are benefiting from export subsidies.

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[20] See Sturm, Customs Law & Administration, § 48.1, at 20–22 (1990).

[21] *Id.*

Determination, 55 Fed. Reg., at 7758 (emphasis added).

Commerce's discretionary practice of excluding Surrogates determined to provide subsidies has expanded two-fold from its inception. First, Commerce decided to exclude surrogates determined to provide subsidies to any industry, assuring that those subsidies benefited other unrelated industries. Second, Commerce made a logical leap from that tenuous platform to exclude surrogates which may possibly provide export subsidies, without any proven, hard facts to corroborate the "finding" of subsidies. No final determination of subsidies was made for any textile industry in Indonesia, Malaysia or the Philippines, nor are there any final determinations outstanding that subsidies exist in any industry in those countries.

Commerce states that it rejects surrogates because of the possibility that their products benefit from export subsidies. But Commerce's actions follow a different line. The original Commerce Department practice rejected import data which might have benefited from established subsidies, while the new practice disqualified data on production which *might* benefit from subsidies which *might* exist. Imports which might benefit could just as easily *not* benefit, from a subsidy which just as easily might not exist. No substantial evidence is necessary to the second standard. No adversarial procedure is available to exporters to defend the disqualified surrogates. By expanding its discretion, Commerce forces itself to *guess* whether subsidies exist. The Court is aware that the ITA sometimes takes an "overly sweeping view of the authority it is granted." *Olympic Adhesives, Inc. v. United States*, 899 F.2d 1565, 1571, ____ Fed. Cir. (T) ____, ____ (1990). The substantial evidence standard was developed to avoid such arbitrary uses of discretion. Guesswork is no substitute for substantial evidence in justifying decisions.

The new practice cannot stand without an explanation of why the ITA believes it necessary to expand the exclusion standard in order to sanitize the information used to calculate foreign market value. The use of preliminary findings to disqualify surrogates is arbitrary and not in accordance with law. The result in this case is a Determination that excludes several economically comparable third world surrogates in favor of an industrialized country.[22] Commerce has extended its discretion without any precedent or any basis in law or ITA regulations and the result is that the new "practice" cannot stand as a matter of law in the instant case.

c. *Indonesia and The Philippines:*

CNART objects to ITA's use of factual findings from preliminary investigations to disqualify Indonesia and the Philippines. Both are conceded to be more economically comparable to the PRC than is Hong Kong. Commerce disqualified them based on preliminary determina-

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[22] *See Tehnoimportexport v. United States*, 15 CIT ____, Slip Op. 91-45, at 9 (June 4, 1991) ("Commerce is required to compare similarly developed economies; for example, the United Kingdom would not make a suitable surrogate for Albania.").

tions which were later dropped with no final findings made. Because the findings were never finalized, CNART challenges the validity of those findings and the conclusions drawn from them. Brief in Support, at 36–38. Presumably ITA could exclude the countries subject to a preliminary finding of dumping in perpetuity because those findings can never be challenged administratively. Reply, at 7.

1. *Indonesia:*

Commerce rejected Indonesia because Commerce had preliminarily found that countervailable domestic and export subsidies were provide to textile producers, with a dumping margin of 0.83 per cent.[23] After the preliminary finding, Indonesia acceded to the GATT Subsidies Code, *i.e.* became a "Country under the Agreement,"[24] and plaintiff in the investigation dropped its suit. By becoming a Country under the Agreement Indonesia tacitly agreed to halt the subsidy that had been found.[25] CNART points out that if ITA explicitly found that Indonesia subsidizes exports despite accession to the GATT Subsidies Code, it would be exceeding its statutory authority, as only the United States Trade Representative is authorized to do so. Reply, at 8. Such a finding is implicit when ITA disqualified Indonesia because of suspected subsidization. CNART submits that Indonesia's accession to the GATT creates an inference that export subsidies are *not* available to the shop towel industry. Reply, at 9.

The only basis for excluding Indonesia from surrogacy was a preliminary textiles determination of 1984. For the reasons stated above, ITA wrongfully excluded surrogates based on preliminary subsidy findings and Indonesia may be considered for use as surrogate.

2. *Philippines:*

The ITA rejected the Philippines as a surrogate because its textile industry had a preliminary finding of subsidization.[26] ITA also disqualified it because of a withdrawn determination of export subsidies on canned tuna.[27] ITA made the "reasonable inference" that shop towel producers had subsidies as well. Opposition, at 20. CNART argues that the *Canned Tuna* subsidy should not disqualify the Philippines, because the subsidy was *de minimis*, and because the ITA revoked the determination following two reviews resulting in *de minimis* margins. Brief in Support, at 33–34, Reply, at 10. The Court agrees. Revoked determinations cannot be used to disqualify surrogates. The Philippines, like Indonesia, has acceded to the GATT Subsidies Code, and the ITA therefore should not give preclusive effect to a preliminary countervailing duty

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[23] 49 Fed. Reg. 49,672 (Dec. 21, 1984).

[24] *See* 19 U.S.C. § 1671(b) (1991).

[25] Article 9 of the Agreement in Interpretation and Application of Articles VI, XVI of the General Agreement on Tariffs and Trade, T.I.A.S. 9161.

[26] 50 Fed. Reg. 15,208. This investigation was not concluded because the petition was withdrawn.

[27] *Final Affirmative Countervailing Duty Determination; Canned Tuna from the Philippines*, 48 Fed. Reg. 50,133 (Oct. 31, 1983).

determination. Both the Philippines and Indonesia should logically have been presumed *not* to subsidize.

Indonesia and the Philippines cannot be disqualified safely on the basis of preliminary investigation findings because of the many procedural and substantive differences between preliminary and final results of administrative reviews. Collateral effects should not be given to untested findings made in preliminary determinations. Countries that are more economically comparable to the PRC than the chosen surrogate which were excluded on the basis of preliminary determinations must be considered for use in place of Hong Kong.

VI. *ITA's Claim That There is a General Practice is Unfounded:*

Commerce's cites two prior determinations to establish the "general practice" of ignoring surrogates that may possibly provide subsidies.[28] The language of the *Steel Wire Nails* determination is similar to the Determination at issue here. However, ITA does not explain why it enlarged the scope of the standard used to exclude surrogates; the *Steel Wire Nails* determination merely states that: "[w]e are excluding Israel from our determination of foreign market value because of the possibility that such imports are benefiting from export subsidies, and are instead using only Korea."[29]

The other case cited in the Determination as evidence of a "general practice" does not use the "possibility" standard. *Porcelain-on-Steel Cooking Ware* first cites the established practice of excluding due to known subsidies,[30] and later states that "[i]n considering which countries' imports to use in calculating foreign market value, we generally disregard imports from countries that are also under investigation, nonmarket economy exporters and *countries believed to maintain export subsidies*.[31] The Porcelain-on-Steel Cooking Ware determination originally uses the "known subsidies" standard, so the quoted language may be regarded as a reiteration of that standard. ITA cannot buttress the "mere possibility" standard by citing to the more pedestrian "known subsidies" standard case.

Commerce implies in the Determination that the "possibility of subsidies" standard is the equivalent of "countries believed to maintain export subsidies" used in the *Porcelain-on-Steel Cooking Ware* determination. There is a logical difference between a belief, which usually must have some basis in fact, and a possibility, which does not necessarily need any facts to back it up. Possibilities are not equivalent to beliefs, and it is not enough that a thing be possible for it to be believed. Therefore, two unjustified and unrelated prior statements do not a

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[28] *Steel Wire Nails from the People's Republic of China; Final Determination of Sales at Less Than Fair Value*, 51 Fed. Reg. 10,247, 10,248 (March 25, 1986), and *Porcelain-on-Steel Cooking Ware from the People's Republic of China"*, 51 Fed. Reg 36,419 (Oct. 10, (1986).

[29] *Steel Wire Nails*, 51 Fed. Reg., at 10,248.

[30] *Porcelain-on-Steel Cooking Ware*, 51 Fed. Reg., at 36,421.

[31] *Id.* 51 Fed. Reg., at 36,423 (emphasis added).

general practice make. ITA's statement that there is a "general practice" is unsupported.

VII. *Disqualification of Surrogates for Subsidies Found in Other Industries:*

ITA disqualified other countries because of subsidies applicable to areas other than shop towels, or even textiles. CNART argues that there is no reason to believe that a set of programs available to and utilized by one industry is *ipso facto* available to and being used by a totally different industry. Brief in Support, at 34. In light of this Court's holding above, it is unnecessary to reach the merits of this argument. Comparable economies are qualified for surrogacy, and must be used in a redetermination of the dumping margin. Should the ITA disqualify Malaysia, the Philippines and Indonesia on other grounds, the Court may reach the merits of CNART's argument, but does not need to do so at this time.

VIII. *Conclusion:*

ITA's selection of Hong Kong as surrogate was unsupported by substantial evidence. ITA's exclusion of Indonesia, the Philippines and Malaysia was also unsupported by substantial evidence on the record as a whole. The evidence suggests that either Indonesia or the Philippines are more economically comparable to the PRC than Malaysia. All three are more comparable than Hong Kong. As a result, this case is remanded to the International Trade Administration for recalculation of the dumping margin using import unit values from Indonesia, the Philippines or Malaysia. In addition, the recalculation must correct the clerical errors described at pages 53 and 54 of CNART's Brief in Support.

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED
C91/219 7/30/91 Goldberg, J.	Domtar, Inc.	90–8–00404	4802.52.10.00 Various rate
C91/220 7/30/91 Goldberg, J.	Joseph E. Seagram & Sons, Inc.	90–8–00426	Withdrawn for consumption under 169.3 $0.87 or $0.7 per proof gal
C91/221 7/30/91 Goldberg, J.	Manchester Knitted Fashions, Inc.	89–11–00624	384.02 or 381. 23.3% witho duty allowan under item 807.00
C91/222 7/31/91 Goldberg, J.	BASF Corp.	88–8–00663	409.86 9% 409.92 15% 409.90 20%
C91/223 7/31/91 Goldberg, J.	Bellarno Int'l	90–1–00008	716.09–716.45, 715.15, etc., Various rate

CATION DECISIONS

D	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
es	4802.52.90.00 Various rates	Agreed statement of facts	Derbyline, VT Windsor wove paper
r n 38 .78 allon	Entries were not liquidated until expiration of the four-year period after date of final withdrawal and, in accordance with 19 U.S.C. 1504(a) at rate and value asserted at time of withdrawal for consumption	Agreed statement of facts	Champlain Not stated
.02 out nce	Merchandise subject to duty allowance under item 807.00	Agreed statement of facts	Miami Knit shirts
	474.26 1.8%	Agreed statement of facts	Richmond Gravure ink
5, , es	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.

C91/224 7/31/91 Goldberg, J.	North American Underwear	89–9–00506	384.09 or 384.25 14% or 22.7%
C91/225 8/5/91 Goldberg, J.	General Instrument Corp.	90–3–00140	8528.10.80 5%
C91/226 8/5/91 Goldberg, J.	Riekes Crisa Corp.	78–7–01216	546.52 50%
C91/227 8/5/91 DiCarlo, J.	Zenith Electronics Corp.	90–7–00341	682.60 3%
C91/228 8/6/91 DiCarlo, J.	Temlex Trading Co.	91–1–00024	716.09–716.45, 715.15, etc., Various rates
C91/229 8/8/91 Musgrave, J.	E.M. Chemicals	85–12–01738	407.16 Various rates
C91/230 8/8/91 Musgrave, J.	E.M. Chemicals	85–12–01740	407.16 Various rates
C91/231 8/8/91 Musgrave, J.	E.M. Chemicals	86–5–00580	407.16 Various rates
C91/232 8/8/91 Musgrave, J.	E.M. Chemicals	87–8–00833	407.16 Various rates

384.34 8% 384.94 17%	Agreed statement of facts	New York Sleep-shirts
8529.90.35 Various rates	Agreed statement of facts	Puerto Rico Chassis designed for Video-cipher descramblers, Model 2100E
A548.05 Free of duty	Riekes Crisa Corp. *v.* U.S., S.O. 90–33 (1990)	Laredo Glass liner trays
676.54 Free of duty	Digital Equipment Corp. *v.* U.S., 889 F.2d. 267 (1989)	Laredo Switch mode power supplies
688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
685.70 Various rates	E.M. Chemicals *v.* U.S., 920 F.2d 910 (1990)	New York Nematic Liquid crystals
685.70 Various rates	E.M. Chemicals *v.* U.S., 920 F.2d 910 (1990)	New York Nematic liquid crystals
685.70 Various rates	E.M. Chemicals *v.* U.S., 920 F.2d 910 (1990)	New York Nematic liquid crystals
685.70 Various rates	E.M. Chemicals *v.* U.S., 920 F.2d 910 (1990)	New York Nematic liquid crystals

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED
C91/233 8/8/91 Musgrave, J.	E.M. Chemicals	88–4–00278	407.16 Various rates
C91/234 8/8/91 Musgrave, J.	E.M. Chemicals	89–6–00301	407.16 Various rates

ECISIONS --Continued

	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
	685.70 Various rates	E.M. Chemicals *v.* U.S., 920 F.2d 910 (1990)	New York Nematic liquid crystals
	685.70 Various rates	E.M. Chemicals *v.* U.S., 920 F.2d 910 (1990)	New York Nematic liquid crystals

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED
V91/8 8/1/91 Goldberg, J.	Intalco Aluminum Corp.	88–8–00634	Computed value
V91/9 8/5/91 Aquilino, J.	E.C. McAfee	83–12–01783	Transaction val

ION DECISIONS

	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
ue	At total invoice value for entry expressed in U.S. dollars plus 20% of difference between total appraised value and total invoice value	Agreed statement of facts	Blaine Calcined petroleum coke
lue	At invoiced value, less total costs incurred for transportation less brokerage fees, less customs duties	Agreed statement of facts	Buffalo Aluminum granules

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